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In the Supreme Court
of the United States

No. 387

OCTOBER TERM, 1961

L. M. SMITH, also known as LAURENCE M. SMITH, and EARL C. COREY,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION OF LAURENCE M. SMITH FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Lawrence M. Smith, one of your petitioners, prays that a writ of certiorari issue out of this court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 27, 1962.

OPINIONS BELOW

The opinion of the court below in this case has not been reported at this time, and is set forth in Ap-

pendix A. The judgments below are printed in Appendix B.

JURISDICTION

The judgment of the court below was entered on June 27, 1962. A timely petition for rehearing was filed in that court on July 26, 1962, and was denied by it on July 31, 1962. The jurisdiction of this court is invoked under 28 USC 1254 (1) and Rule 22 (2) of this court.

QUESTIONS PRESENTED

1. Whether the remarks, comment upon the evidence and conduct of the trial judge went beyond lawful and proper limits and, when considered in their entirety and in their total effect, were such as to create an impression of advocacy by the court on behalf of the government with the result of denying this petitioner due process of law and the fair and impartial trial by jury upon the question of his guilt which is guaranteed to him under the Constitution and laws of the United States.

2. Whether the decisions of this court and of other courts of appeals require the trial court to give in this case an instruction requested by petitioner which said in substance that evidence of his good character may alone be sufficient to create a reasonable doubt although without it the evidence might otherwise be convincing.

3. Whether the agents of the government violated 26 USC 7213(a) in examining the personal income tax returns of Earl C. Corey, and, if so, whether petitioner was denied a fair trial by the receipt of evidence against him which emanated from and was disclosed by that unlawful source.

4. Whether 18 USC 434 was violated in this case where the government employee involved does not personally participate in the negotiations or other dealings between the government and his private business entity, such matters being conducted exclusively by subordinates, and where he gives no instructions to and exercises no control over those subordinates with respect to such dealings.

5. Whether the construction placed upon 18 USC 434 by the court below renders that statute so vague and indefinite that reasonable men would not know and could not tell what conduct is prohibited and made criminal thereby and whether, in failing to set any standard by which criminal conduct under the statute can be determined, the statute as so construed is rendered so vague and indefinite that the petitioner has been deprived of rights guaranteed him by the Fifth and Sixth Amendments to the Constitution of the United States when the statute was invoked against him in this case.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

18 USC 434: Whoever being an officer, agent or member of or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership or other business entity is employed or acts as an officer or agent of the United States for the transaction of business with such entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

26 USC 7213: (a) Income Returns—

(1) Federal employees and other persons—
It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof, or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return or any part thereof, or source of income, profit, losses or expenditures appearing in any income return; and any person committing an offense the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year, or both, together with the costs of the prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

15 USC 714M(a): Whoever makes any statement

knowing it to be false, or whoever wilfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under Sections 714-714 o of this Title or under any other act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

18 USC § 371: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000, or imprisoned not more than five years, or both.

28 USC 6103:

(a) Public Record and Inspection.—(1) Returns made with respect to taxes imposed by Chapters 1, 2, 3 and 6 upon which the tax has been determined by the secretary or his delegate shall constitute public records; but except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by Chapters 1, 2, 3, 5, 6, 11, 12 and 32, subchapters B, C, and D of Chapter 33, and subchapter B of Chapter 37 shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in Rules and Regulations promulgated by the President.

Amendment V, Constitution of the United States:

No person shall be held to answer for a capital, or

otherwise infamous, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, Constitution of the United States: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT

This is a criminal prosecution commenced by a joint indictment in eleven counts returned in the United States District Court for the District of Oregon, which alleged violation by this petitioner and one Earl C. Corey of certain criminal statutes of the United States. The jurisdiction of the District Court of the United States for the District of Oregon was predicated on 18 U.S.C. 3231 and the jurisdiction of the District Court to entertain a motion for a new trial was invoked under Rule 33, Federal Rules of Criminal Procedure, 18 U.S.C.

The first eight counts of this indictment charged this petitioner, L. M. Smith," with violation of Title 15, USC § 714 m (a). The thrust of the charge in these eight counts was that he had filed eight separate documents which it was alleged contained false statements "to the effect" that he was the "sole owner" of a business known as the Three State Warehouse. The alleged falsity of the documents was his alleged statement of sole ownership when the fact, according to the allegation, was the business was owned as a partnership comprised of himself and two others.

Count IX of the indictment alleged violation of he had conspired with his codefendant, Earl C. Corey, he had conspired wtih. his codefendant, Earl C. Corey, and another, not named as a defendant, to violate the aforesaid Title 15 § 714 m (a) USC.

The remaining count of the indictment, which involved this petitioner, Count XI, alleged a violation of Title 18 § 371 USC. The purport of this allegation was that Smith, Corey and Richards had conspired together to have Corey violate Title 18 § 434 USC (the conflict of interest statute), and it was further alleged in this count that a purpose of the conspiracy was to defraud the government of the fair, unbiased and impartial services of Corey, a government employee who held the office of director of the Portland office of Commodity Stabilization Service, United States Department of Agriculture.

The indictment also contained a Count X charging Corey alone with a violation of Title 18 § 434 USC.

Defendants entered pleas of not guilty to all counts. They were required to stand trial together and the trial was held in the United States District Court for the District of Oregon, with a jury.

The interference and participation of the trial judge commenced at the threshhold of the proceeding, the first incident occurring during the opening statement of petitioner's counsel as he attempted to explain what evidence he would produce in answer to certain claims which the government had indicated it intended to make (App. C, p. A41).[1]

The government, after establishing some technical details, background and identification of exhibits, called as its witness Willard A. Richards, who was the third member of the partnership and was named in the indictment as a co-conspirator but not a defendant (R. 1).[2] Richards had testified before the grand jury and his testimony was vital to the government in establishing a large portion of its case. Prior to his appear-

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[1] Where the actual words used in any instance are material, those portions of the typewritten transcript have been printed here as Appendix C to this petition. Citations of those portions of the record will be made to the pages in the Appendix. The Court will note, however, the Appendix specifies the pages where the appended material may be found in the typewritten transcript of the proceedings. Where the verbatim transcript is deemed unnecessary to support the fact statement or argument, the matter is not contained in the appendix and the reference is to the page of the typewritten transcript and is designated as Tr.

[2] Where reference to documents in the record other than the transcript of testimony is required, they will be referred to by R. and reference to the appropriate page of the assembly of those documents as it has been made by the court below and filed with this court.

ance before the grand jury. Richards had a conversation with the United States Attorney concerning his position in the case and the question of whether or not he might also be indicted (App. C, p. A42). The details of any understanding reached between him and the prosecutor is not revealed, but the fact is he was not indicted although the government in fact contended on the record that he was a co-conspirator.

The trial court, on its own motion, summarily restricted cross examination of Richards by prohibiting leading questions by Smith's counsel and the jury was advised at that time that the court believed Richards was friendly to Smith (App. C, p. A42). Also, during his direct examination, the trial court, for some reason, selected, repeated and thereby emphasized the answer of Richards to one of the most crucial questions which was asked of him (App. C, p. A41, A42). The cross examination of the next government witness, Mr. Jacobson, was also inhibited by the court in the same manner and on the same grounds (App. C, p. A43).

The government called as a witness one Farnam White. The prosecutor undertook to elicit from him conjectural or hypothetical answers concerning what he would have done in his official capacity if he had known of certain facts. Objection to this was made and sustained, so the prosecutor abandoned the inquiry and moved on to another subject (App. C, p. A44). However, the court shortly thereafter assumed the burden of direct examination of the witness in this particular and established for the prosecution the matters which the government had just attempted to

present without success (App. C, p. A44). The form of the questions chosen by the court to accomplish this purpose carried a suggestion to the jury that it was a fact to be assumed by them that Smith's statements were in fact false, which was the very fact in issue under the first eight counts.

Another government witness, one Franklin, Smith's accountant, testified that Smith advanced the money to capitalize the business and charged the partnership no interest on that money. The government placed substantial reliance upon this fact and repeatedly sought to draw sinister inferences from it (Tr. 6, 9, 558). When Franklin established this fact, the court immediately singled out the answer, and repeated it to the jury (App. C, p. A45).

Thereafter, the government called a Mr. Thompson, whose company provided the bond of the warehouse partnership. His records were called for and he was examined generally with respect to statements Smith had made to the bonding company in response to their question with respect to his ownership of the business. While he was on the stand and in the presence of the jury, the court directly called upon counsel for Mr. Smith to stipulate that Smith had in fact made representations that he was the sole owner of the business (App. C, pp. A45, A46). Actually there was no evidence before the jury that Smith had made any such statement or representation. However the effect of the request for such stipulation was to call upon a defendant to give evidence against himself.

Shortly after this incident, the government rested and Smith commenced the presentation of his case. As part of his direct testimony, Smith was asked to explain how the rates of his payment as a warehouseman for the government were ascertained and to show that he received no favoritism with respect to this but was paid the same amount as anyone performing the same services for the government (Tr. 336). This in the light of the statement by government counsel that they would show that the contract was not a good one for the government (Tr. 10).

On its own motion, the court ordered the inquiry abandoned and directed counsel to get down to business and get to the thing the government is accusing him of doing (App. C, p. A46).

On cross examination, however, the court permitted the prosecutor to make reference to Smith's high tax bracket and the amount of the profit the partners realized from the venture and the court administered no similar preemptory castigation or limitation upon the government (App. C, p. A47).

The court rendered substantial assistance to the prosecutor in the cross examination of Smith. The prosecutor attempted to impeach Smith but his effort was largely unsuccessful and unproductive (App. C, pp. A47, A48). The trial court, however, assumed the burden of accomplishing the task (App. C, pp. A48, A49).

Later, this petitioner called an attorney named John Phelps, from whom he had received legal advice concerning the propriety of this venture prior to his entry

into it (Tr. 324-326). The witness was asked concerning the advice he had given Smith. On his cross examination the trial court interrupted the prosecutor and proceeded to conduct his own cross examination upon an irrelevant matter (App. C, pp. A49, A50). He thereafter used that examination as the basis for an instruction and comment to the jury, which, in the eyes of the jury, completely destroyed the credibility of the witness with respect to all the matters about which he testified. (App. C, p. A52). The court's cross examination in essence took legal issue with the quality of the advice which the witness swore he had given to Smith, but the court's comment during its instructions to the jury dealt with his credibility generally and the court's personal dislike for the man.

Upon the issues presented concerning the fundamental fairness of the trial, and the lack of objectivity of the atmosphere in which it was conducted, we call attention now to certain matters contained in the court's instructions generally, not upon any theory that they provide a basis *per se* for reversing this case, but in the belief that they further demonstrate the adverse atmosphere in which the issues were submitted to the jury.

Upon the question of assessing the credibility of any witness generally, the court advised the jury of the consideration of bias and interest which should be taken into account (Tr. 692). Concerning witnesses not parties, the court also advised the jury that those stated considerations might not, however, affect the accuracy and truthfulness of their testimony (Tr. 693), and left

it to the jury to determine the extent to which such factors did or did not influence such testimony.

The same general instruction concerning interest in the outcome was given with respect to the parties themselves who became witnesses in their own behalf and the considerations of bias and interest previously mentioned with respect to other witnesses was again stated and especially applied to defendants (Tr. 693). Although requested to do so, the court refused to add to this instruction one which would have informed the jury that the consideration of interest in the outcome might not, however, affect the truthfulness and accuracy of defendants as witnesses either (Tr. 726).

The jury was instructed, in essence, that to sustain a conviction, the government was not required to prove that it suffered any loss by reason of the alleged conflict of interest or by reason of the existence of a conspiracy and that defendants might be found guilty in the absence of such showing (Tr. 698, 701, 705). The jury was advised that defendants could be found guilty although the object of the conspiracy was never accomplished (Tr. 704). This was followed by an instruction that a showing that any of the aims of the conspiracy had been accomplished would be strong evidence that the conspiracy did, in fact, exist (Tr. 705). The legal propriety of such instructions is not here questioned.

The court refused, however, although requested to do so (Tr. 727, 728), to advise the jury of the other side of the matter and to tell them in substance that absence of injury to the government would be evidence

for them to consider which tended to show that no conspiracy existed.

Smith produced evidence of his prior good character, which was uncontradicted by the government, and he requested an instruction upon that subject (App. D, p. A54). The request was refused. In lieu thereof, the trial court gave a substantially different instruction upon the subject of the effect of good character evidence (App. D, p. A53).

The facts necessary for a determination of the questions presented concerning the interpretation and applicability in this case of Title 18 § 434 USC and the issue raised thereby, have been summarized adequately by the court below and recited fairly and accurately in its opinion. We take no issue with their statement by the court below and adopt it as accurate herein.

After the trial and after the commencement of his appeal, petitioner learned for the first time that the government's initial information concerning the Three State Warehouse Company and the individuals comprising it was obtained by an Agriculture Department investigator when he examined the personal income tax returns of defendant Corey. This was learned when the government was required by another department of the District Court to answer an interrogatory seeking to learn the source of that information, which was propounded in civil litigation then pending between the government and the same defendants and concerning the civil aspects of the same facts which gave birth to the criminal prosecution. Petitioners promptly moved the

court for a new trial and made then, and now make, the contention that the examination of the tax returns had been unlawful and in violation of 26 USC § 7213(a) and that it, together with the other evidence discovered from its lead was, therefore, inadmissible in the criminal proceedings. Under the doctrine of *Nardone et al* v. *United States*, 308 U.S. 338.

The government conceded that the inspection would not have been authorized under the provisions of 28 USC 6103(a)(1), but places its reliance upon subsection (2) of that same statute which petitioner contends had not been complied with.

REASONS FOR GRANTING THE WRIT

This petition raises several questions dissimilar in nature but each of which falls within one or the other of the various categories of matters which this court has indicated as significant enough to justify its acceptance and determination of them in cases in the past.

I.

The conduct of the trial judge as it operated to create a prejudicial atmosphere for the trial, and the question of the propriety of his comment to the jury respecting a crucial point in petitioner's defense, raise issues going to the very foundation of the concept of trial by jury and of due process in the administration of criminal justice under the Constitution and laws of the United States. By its refusal to order a new trial, free of such improper influences, the court below has

sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings, and the gravity of this situation is such as to call for an exercise of the power of this court to supervise criminal proceedings in the courts of the United States.

The question presented upon this phase of the case raises a fundamental issue with respect to the extent to which a trial judge may go in expressing himself, his opinions and attitudes toward a defense in a criminal case without treading upon the rights of the accused to a jury trial and due process of law under our Constitution. Submitted here is a case with a record which is full of the attitudes, opinions, conclusions and personal feelings of the judge who presided, and the effect upon the jury of his repeated interference and intrustion must be obvious. By this petition is raised the question of how far the rights and liberties of an individual, as guaranteed under the Constitution, may be taken or otherwise affected by the participation by a federal judge in a jury trial upon a criminal indictment in the courts of the United States. We say the court has gone too far in this case and that the individual liberties of this defendant have been unlawfully taken from him. To be sure, some of the incidents to which we refer were more significant and injurious than were others, but it is the total effect upon the jury of all of them which produced the injury and necessarily conveyed to the jurors the feeling that the trial court had a definite conclusion about the guilt of defendants and a definite purpose to aid the prosecution in establishing it. When such an impression was created, it was inevitable that

the jury would retire for deliberation in a frame of mind which would make it impossible for them independently, fully and fairly to assess the evidence and resolve the issues with the impartiality and freedom of thought which is contemplated by our basic law. Jurors, in such case, would necessarily be reluctant, irrespective of their personal conclusions in the matter, to reach a result which would be at variance with what they knew to be the attitude and opinion of the trial judge. This, we contend, is a result which goes beyond the legal privilege of a trial judge in the federal courts.

Involved here is the problem of balancing the rights of a citizen who finds himself in a contest with his government with the right or duty of a federal judge to participate in a criminal proceedings and discharge the legitimate responsibilities and functions which the law gives to him.

This petitioner does not question, as a general matter, the right and, indeed, in some instances the duty, of a federal judge to take a hand in proceedings before him and to participate actively therein. Such a right and responsibility has traditional recognition in our federal substantive law.

On the other hand, the very cases which articulate the rule authorizing participation by the trial judge also acknowledge limitations and restrictions, in order that the Constitutional concept of trial by jury be retained in every federal criminal proceeding. This case involves a measurement of the trial judge's conduct in it against the restrictions thereon stated in general terms

by this and many federal courts of lower jurisdiction and requires an application of the standards thus enunciated to the particular facts of these proceedings.

The court below has erred in its disposition of this matter and, in erring, has sanctioned a criminal proceeding wherein important basic rights of an individual have been violated and this court ought to put its mark of disapproval upon such a trial. What is involved here is the application of concepts which are as old as our nation and petitioner seeks a fair application of these long established principles which have heretofore been denied him in this case.

The issue is whether the trial which was given in this case was a fair and constitutionally adequate one as that adequacy is described and defined in such cases as *Starr* v. *United States,* 153 U.S. 614, and *Quercia* v. *United States,* 289 U.S. 466. We say the principles enunciated in these cases were violated in that the trial judge's comments, questions, cross examination, open request for a damaging stipulation, instructions weighted in favor of the prosecution, and other similar conduct transgressed the inherent limitation which the Constitution and cases from this court place upon his power to direct and control the proceedings before him.

The comment to the jury upon the credibility of the most important defense witness (Phelps) contained a deduction and theory not warranted by the evidence in this case, and therefore exceeded the bounds of proper exercise of his discretion.

The absence of any justification for the comment

is acknowledged by the court below. Its reasoning in the matter is puzzling. It begins by an acknowledgment that the cross examination by the trial judge was upon an irrelevant matter, and even infers that the incident did produce prejudice (App. A, p. A13). It thereupon holds, however, that the prejudice was cured by an admonition to the jury which the trial court gave immediately after the episode. In spite of these admissions of impropriety, irrelevance and prejudice, however, the opinion proceeds to approve of and authorize the expression of an opinion to the jury given in the form of a comment during its instructions to the jury which was based totally upon the acknowledged irrelevant and prejudicial matter, and finds nothing amiss in so doing (App. A, p. A14).

Also brushed aside by the court below as immaterial is the obvious fact that in branding this witness untruthful with respect to his testimony concerning the advice he had given to this petitioner and his testimony that he did so advise him, the court thereby branded the defendant's own testimony on that same subject as an untruth. This is a further deduction in theory having no warrant in the evidence.

By making this comment upon the evidence the trial court effectively branded petitioner's defense as contrived and false, because his intent and motive raised the crucial issue. Disparagement of the defense in this way actually amounted, by inference at least, to the expression of an opinion that he was guilty.

If allowed to stand the opinion below authorizes a

trial court to make and express conclusions and opinions of this kind based solely upon a subjective personal assumption of the judge which has no factual or other circumstantial foundation in the record. So far as it relates to the prerogative of the court to comment upon the evidence and express opinions with reference thereto, the opinion below has gone far beyond any existing case. To be sure, it refers to and purports to apply and follow the general principles common to all of the other decided cases on a similar subject, but an examination of its application of them to this record reveals an extreme step beyond any decision at the present time.

The decision below is at variance, in principle at least, with decisions from other courts of appeals on similar questions. It acknowledges (App. A, p. A15) that the comment must be fair. Its finding that it was fair in this case is not in accord with such cases as *United States* v. *Meltzer*, 100 F.2d 739 (7 Cir.); *Burtnett* v. *United States*, 62 F.2d 452 (10 Cir.) and *Parker* v. *United States*, 2 F.2d 710 (6 Cir.), all of which are cases reversing convictions where a comment on the evidence was made to a jury and it was thought by the Court of Appeals to be unfair in that it represented an unwarranted conclusion by the trial judge not based on any relevant circumstance occurring at the trial.

We believe that no federal appellate decision exists which would authorize the result reached in this case.

In the court below we sought to make this point of distinction, but it was rejected without comment.

The distinction points up the problem sharply, be-

cause where the case is exceptional, as observed in *United States* v. *Murdock*, 290 U.S. 389, or where matters occurred at the trial which require the explanation of the trial judge to assist the laymen in the box in understanding the meaning of the evidence, then the very purpose for the comment privilege exists and is served by the giving of fair direction and explanation. Absent such exceptional cases or incidents in the record calling for the assistance of the judge by way of comment or explanation, the disparagement of a defense by the trial court exceeds the limitation upon that right and treads unconstitutionally upon sacred rights of the defendant.

In placing its stamp of approval upon these proceedings the court below has indulged in the reasoning that two wrongs produce a right. In passing, without discussion, the various incidents of the trial court's intrusion into the proceedings, the court below admitted (App. I, p. A16) that some of the instances in which the judge took a hand in the proceedings undoubtedly proved helpful to the prosecution. It hastens to add, however, that other instances unquestionably aided the appellant and concludes, therefore, that no harm was done. It is obvious that if the judge aided the prosecution and left the impression with the jury that defendants ought to be convicted, it is no answer to say that defendants were assisted in some particulars in the presentation of their own case. We submit, however, that any instances of "aid" to defendants by the judge were instances of sustaining an objection or otherwise according defendants a right guaranteed to them under the law

in any event, and were instances of an entirely different character from those directed against defendants and of which complaint is now made.

In addition to the trial court's activity in his examination of the witness Phelps and his subsequent scathing denunciation of Phelps' character and veracity, his other conduct was such as to deal a mortal blow to the fairness of the proceedings and constituted excesses which ought not to be condoned. In approving these proceedings and this record, the court below is at variance with such cases as *Blumberg* v. *United States*, 222 F.2d 496 (5 Cir.) and a number of other cases from that court of appeals, as well as *Franiz* v. *United States*, 62 F.2d 737 (6 Cir.), *United States* v. *Marzano*, 149 F.2d 923 (2 Cir.), and *United States* v. *Carmel*, 267 F.2d 345 (7 Cir.). The government raised a similar complaint based upon unfounded and unwarranted interference by the trial judge and was successful in its contention in *In re United States*, 286 F.2d 556 (1 Cir.).

A fair summary of all of the cited cases shows that there are inherent limitations upon the judge's right to participate in the taking of the testimony and the conduct of the trial. These cases all indicate that the judge, if he intends to participate, must not only be impartial and disinterested, but must also appear so, and his interruptions and intervention, even if spontaneous rather than calculated, must not be, or seem to be, on the side of the government. Furthermore, from these cases is gleaned a requirement that his participation must be in somewise necessary in aid of finding the truth and

in furtherance of justice. When there is no such need, his participation is improper.

We submit that this record discloses a breach of all of these standards. It shows the trial court failed to be calmly judicial, dispassionate and apparently impartial, and that he failed to avoid the appearance of advocacy as he participated in the taking of the testimony and the governing of the trial.

Whatever may be said concerning the right to comment upon the evidence during instructions to the jury, the concept of a jury trial contemplates even more limitation upon and restraint by the trial court if he undertakes to intrude into the other phases of the trial in a manner likely to influence the thinking of the jury. The appearance of advocacy at this point in the trial occurs when there is usually no opportunity to instruct the jury directly and at the time concerning the part which his attitude is to play in their deliberations as is done when the usual comment on the evidence is made during instructions. Unless there is a legal and fair reason for his so doing, such conduct ought not to be condoned. Even where the record might otherwise show propriety and necessity for such intrusion, other courts of appeals rquire that it be dispassionate and impartial.

In approving these proceedings, the court below has ignored those standards.

II.

Petitioner's rights were further violated, although he was not aware of it until after the verdict, in that the

entire prosecution was founded upon facts and evidence to which the government was led by reason of an unlawful examination of the personal income tax returns of defendant Corey, in violation of 26 USC 7213.

Contrary to the statement in the opinion of the court below (App. A, p. A7), this matter was raised there and presented here upon the rationale of *Nardone et al* v. *United States*, 308 U.S. 338. With respect to this, the government claims its conduct was legal by reason of 26 USC 6103(a)(2), and our contention of illegality is that the regulations relied upon by the government and thought to be issued in compliance with the statute were not in fact promulgated by the president in accordance with the requirement of the above-cited subsection of that statute, but are a product of the Secretary of the Treasury.

The Court of Appeals held that the examination of these tax returns was proper and, in so doing, committed a basic error in statutory construction. Subsections (1) and (2) by their terms provide for a different method for the promulgation of regulations governing inspections of tax returns. The court below held, however that Congress intended the same meaning for both subsections. Such a determination ignores the effect which ought to be given to the fact that both subsections were enacted together and appear in the same statute and Congress made a precise differentiation between the two in the procedure which was to be followed. This of itself indicates conclusively an intent that the differences thus expressed were meaningful and were to be given effect.

Furthermore, the effect of the opinion below is to render subsection (1) of the statute unnecessary as excess verbiage.

The reason given for its conclusion by the Court of Appeals was that it found no factual reason for construing the different language as having different meaning. In view of the difference of phraseology it would seem apparent that factual evidence would be unnecessary, but the failure to find such factual reasons, which in fact do exist, probably stems from a mistake on the part of the court in ascertaining the statutes which were antecedent to the present ones now in controversy. Had the proper origins been considered, the Congressional debates with respect thereto would have provided the court below with ample factual evidence that the construction of the statutes involved should be as contended for by defendants. 78 Congressional Record 2514-2516 (1934); 77 Congressional Record 5859-5860 (1933); 77 Congressional Record 5694-5695 (1933) and 45 Congressional Record 4136 (1909-10).

Admittedly one point of our objection in this matter has been cured since the commencement of this case by the promulgation of regulations purportedly under the 1954 Code. However, the promulgation was not in accordance with the requirement of subsection (2) of the statute which the government admits is controlling. Inspections using subsection (2) for authority are unlawful, today.

Presumably investigations of tax returns by various agencies of the government are in progress today and

disclosures of their contents are being made in violation of law. The national importance of this question is manifest. If we are correct in our contention, then the rights of large numbers of citizens are being unlawfully affected and a large number of employees of numerous government agencies are violating a federal statute. The resolution of the controversy is or should be of extreme importance to them and to the conduct and management of the business of the government generally.

So far as the present case is concerned, the matter is important because the court below has by its opinion condoned and approved unlawful and criminal conduct on the part of the government and permitted it with impunity, thus far at least, to use evidence obtained as the result of such conduct in clear violation of the rights of petitioner.

Important questions of a citizen's private rights when contending with his government are presented. None of the charges made against Corey and Smith by the various counts of this indictment is as serious as the violation of law committed by the agents of the government in the preparation of this case. Our system of justice rejects the idea that the end justifies any means, and requires even the government to act in accordance with the appropriate statutes and laws when it undertakes to wield its power of prosecution against its citizens.

From the first day of the investigation until the matter was submitted to the jury this case is fraught with

instances of violation of the rights of this petitioner, which are guaranteed to him under the Constitution and laws of the United States, and, as so tainted, should not be condoned and permitted to stand.

III.

The Court of Appeals, relying upon other decisions of its own and of two other circuits, has rendered a decision herein in conflict with the Courts of Appeals of three other circuits and of this court upon the question of the requested instruction regarding the good character of this petitioner.

With respect to the differences existing between the various Circuit Courts of Appeals upon this issue there is a direct conflict of decision. It is shown by a comparison of *Miller* v. *United States*, 120 F.2d 968 (10 Cir.); *United States* v. *Donnelly*, 179 F.2d 227, 233 (7 Cir.), and *Villaroman* v. *United States*, 184 F.2d 261, 263 (C.A.D.C.), each of which requires, on pain of reversal, the giving of the requested instruction, with the opinion below and the cases therein cited from the Second and Third Circuits.

Furthermore, *Edgington* v. *United States*, 164 U.S. 361, and *Mickelson* v. *United States*, 335 U.S. 469, 476, clearly compel the giving of the instruction as requested, although the Courts of Appeals who decline to do so sometimes say these two cases contain no such compulsion.

The opinion below (App. A, p. A19), acknowledges that the dispute is no mere question of semantics or

distinction without difference. It agrees, tacitly at least, with our contention there and here that the conflict involves a substantial dif ence in thought and content between the two forr , of instruction. Indeed, it observed:

> "The danger in using the word 'alone', when not required to meet a special trial problem, is that the jury may mistakenly take it as an invitation to consider good character evidence to the exclusion of all other evidence."

Implicit in this argument is that the requested instruction would give defendant something more than he is entitled to under the language given by the trial court and approved by the Court of Appeals.

We agree with the court below that the difference is real and substantial and say further that compelling reasons exist why the concept requested by petitioner should be clearly required.

A reading of the opinions of the courts which decline to follow the rule here contended for shows that there is uncertainty concerning the meaning of the cases from this court, above cited, which deal with the problem, and there exists good reason to set the matter at rest and resolve this conflict. As matters now stand, with the circuits which have passed upon the matter evenly divided, the place of trial determines the extent to which a criminal defendant will receive the benefit of a past life of good character and high integrity.

IV.

The decision of the Court below upon the issues tendered with respect to Title 18 USC § 434, is a decision upon an important question of federal law which has not been, but certainly should be, settled by this court. In addition, the light which has been thrown upon the matter by *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, has been dimmed substantially by the opinion of the court below which holds that some connections which the head of any agency has with the dealings the agency carries on with a company may be so remote and tenuous that ultimate responsibility plus knowledge are not alone sufficient to warrant a finding that the official engaged in the transaction of business is in violation of the statute. If that observation is accurate, it inferentially condones some connection and condemns it in other instances and leaves a individual to discern the dividing line at his peril. The Constitution demands that an accused be informed concerning the nature and cause of the accusation against him and the construction of the statute by the court below has rendered that impossible. Furthermore, a prosecution under a statute whose terms are so vague and uncertain as the court below has said they are would work a deprival of one's liberty or property without due process of law.

The importance of clarity in this area is manifest. The government's relationship with private business and the number of day-to-day dealings and transactions between them is enormous and this statute could affect the rights, lives and fortunes of a substantial portion of those in the federal service and in the business community.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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AUGUST 1962

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

L. M. SMITH, also known as Laurence M. Smith, and EARL C. COREY, *Appellants*, v. UNITED STATES OF AMERICA, *Appellee*.

No. 17,601
No. 17,278
June 27, 1962

Appeal from the United States District Court for the District of Oregon

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Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges

HAMLEY, Circuit Judge:

L. M. Smith and Earl C. Corey were jointly tried and convicted on charges involving 15 U.S.C., § 714m(a) and 18 U.S.C., §§ 371 and 434.[1] While their appeals

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[1] 15 U.S.C. § 714m(a)

"Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under Sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both."

18 U.S.C. § 371

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

from these convictions, consolidated as No. 17278, were pending here, they separately moved in the district court for a new trial on the ground of newly-discovered evidence. The motions being denied, they have appealed from the order of denial, these appeals being consilidated as No. 17601. Both appeals will be disposed of in this opinion.

In the spring of 1956, Corey was the director of the Portland Commodity Office, Commodity Stabilization Service, United States Department of Agriculture (Commodity). That office was charged with administering the farm price control activities of the Commodity Credit Corporation, including the storage of Government-owned wheat. At that time Corey became aware of the availability of a warehouse located near Portland, Oregon, which was suitable for storage of grain. He discussed with one William A. Richards the possibility of making use of this warehouse for the storage of Government grain. Richards was then general manager of North Pacific Grain Growers, a large private grain cooperative.

Following these discussions, Corey and Richards met with Smith, who was experienced in the warehousing of grain. Corey and Richards indicated to Smith at that time that they were interested in operating the ware-

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18 U.S.C. § 434

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 703."

house on a partnership basis, provided Smith would handle the actual operation with Corey and Richards as "silent" partners. Smith examined the warehouse, decided that it was suitable for the purpose, and determined that it would require about $90,000 to get the enterprise in operation.

The three men then entered into an oral agreement to engage in the enterprise. Under this agreement, Smith was to lease and operate the warehouses and supply the necessary finances. Corey and Richards were later each to supply one-third of the estimated cost, and were to share equally with Smith in the liabilities and profits of the business. Smith negotiated for and, on April 10, 1956, with his wife, entered into a lease for the warehouse. Later an additional lease covering another warehouse was entered into by Smith and his wife. Smith, on his own account, borrowed all of the money necessary to equip the warehouses and start the business. The business was named "Three-State Warehouse Company."

Smith applied for, and on April 26, 1956, received a grain storage agreement with Commodity for such Government wheat as that corporation might thereafter see fit to entrust to him.

In July, 1956, Richards paid Smith $30,000 as his share of the estimated cost of establishing the business. Thereafter Corey delivered to Smith his promissory note for $30,000, representing his share of the original capital. This note was later paid by deductions from proceeds payable to Corey out of the earnings of the

business. In August, 1956, the three men entered into a written partnership agreement.

The warehouses were owned by the partnership until April 30, 1959, at which time the business was incorporated. Smith, his wife, and the corporation attorney were named the directors and officers, the partners receiving equal stock ownership and the management continuing with Smith.

The business was operated at a loss during the first year, and thereafter a profit was realized each year. The profits were divided equally between Smith, Cory and Richards. The business of Three-State Warehouse Company consisted solely of the storage of grain for Commodity.

Shortly after the incorporation of the business Corey terminated all of his interest in the corporation by selling his stock therein to the corporation for $30,000 He later explained this action as having been motivated by a desire not to embarrass the Secretary of Agriculture, although at that time his interest had not been discovered.

The indictment consists of eleven counts. Counts I through VIII, inclusive, consist of charges that Smith, for the purpose of influencing the action of Commodity, and to obtain money and other things of value under the Commodity Credit Corporation Act, and in violation of 15 U.S.C., § 714m(a), knowingly, on various dates from April 25, 1956 to April. 30, 1958, caused to be made false statements to the effect that Smith was the sole owner of Three-State Warehouse Company, whereas

in truth that company was a partnership owned by Smith, Corey and Richards. These false statements, it was charged, were made in various written documents consisting of applications for approval of warehouse facilities, grain storage agreements, and statements of assets and liabilities.

In Count IX of the indictment it was charged that between April 6 and May 1, 1959, Smith and Corey conspired with each other and with Richards in violation of 18 U.S.C. § 371, to violate 15 U.S.C. § 714m(a) by making to Commodity the false statements referred to in Counts I to VIII, for the purposes charged in those counts. Various overt acts pursuant to this asserted conspiracy, consisting of meetings, discussions, and the execution and filing of documents, were alleged.

In Count X is was charged that between April 26, 1956 and May 1, 1959, Corey, being a partner, member officer, and agent of Three-State Warehouse Company, and directly and indirectly interested in the profits and contracts of that partnership, was employed and acted as an officer and agent of the United States for the transaction of business with that company, in violation of 18 U.S.C., § 434.

In the final Count, XI, it was charged that, commencing on March 1, 1956, and continuing to May 1, 1959, Corey and Smith conspired together and with Richards, to commit an offense against the United States and to defraud the United States in violation of 18 U.S.C., § 371. The offense and fraud which was the subject matter of the conspiracy was the asserted viola-

tion of 15 U.S.C., § 434 by Corey, as charged in Count X. Several overt acts, it was alleged, were committed pursuant to this conspiracy.

Richards, who testified as a witness for the Government, was not indicted.

Each appellant was found guilty on all charges made against him, and each was sentenced to two years on each count of which he was convicted. The sentences were made concurrent so that each appellant was sentenced to a total of two years imprisonment.

We turn first to the appeals from the district court orders denying appellants' motions for a new trial on the ground of newly-discovered evidence.

After the trial appellants learned for the first time that Commodity became aware of Corey's interest in the warehouse company by examining his federal income tax returns. This information was disclosed to them by the Government in answers to interrogatories propounded in civil litigation involving Three-State Warehouse Company.

It is appellants' position that, in examining Corey's income tax returns, Department of Agriculture officials violated 26 U.S.C., § 7213(a), forbidding unauthorized disclosure of information set forth in income tax returns.[2] Based on the assumption that the inspection was

[2] 26 U.S.C., § 7213(a) provides, in relevant part:

"(a) Income returns.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income,

illegal, appellants argue that all of the evidence so collected was inadmissible under the rationale of *Elkins* v. *United States*, 364 U.S. 206.

By the terms of the exception stated in § 7213(a), information contained in income tax returns may be disclosed "as provided by law." In its answer to the interrogatories the Government stated that the inspection was made pursuant to 26 C.F.R. 458.33.[3] However this regulation was issued under the 1939 Code, and appellants assert that it has no application to a return filed pursuant to the 1954 Code.

Inspection of returns made pursuant to the 1954 Code is provided for in 26 U.S.C. § 6103(a).[4] In all

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profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; . . ."

[3] 26 C.F.R. § 458.33(a) reads as follows:

"*Inspection by branch of Government other than Treasury Department—(a) General.* Except as provided in § 458.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government, desires to inspect or to have some other officer or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the Secretary of the Treasury, be permitted upon written application to him by the head of such executive department or other Government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person it is desired shall inspect the return. The information obtained under this section and § 458.32 may be used as evidence in any proceeding conducted by or before any department or establishment of the United States, or to which the United States is a party."

[4] 26 U.S.C. § 6103(a). Publicity of returns and lists of tax-

material respects this section is identical to § 55(a) of the 1939 Code. Rules and regulations implementing § 55(a) were provided by T.D. 4929, which became 26 C.F.R. 458.33. The authority for these regulations is found in the Executive Order of August 28, 1939 (1939-2 C.B. 97) quoted in the margin.[5]

The "carry-over" section of the 1954 Code, 26 U.S.C. § 7807(a)[6] provides that any section of the 1954

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payers.

"(a) Public record and inspection.—

"(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

"(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B, C, and D of chapter 33 and subchapter B of chapter 37 shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President."

[5] This order reads as follows:

"By virtue of the authority vested in me by section 55(a) of the Internal Revenue Code (53 Stat., 29), it is hereby ordered that the following designated returns made under the said Code shall be open to inspection in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury in the Treasury decision relating to the inspection of such returns, approved by me this date.

"Income (including income of personal holding companies and unjust enrichment income), excess-profits, capital stock, estate, and gift tax returns, and returns of employment tax on employers under Subchapter C of Chapter 9 of the Internal Revenue Code."

"Franklin D. Roosevelt.

"The White House,
August 28, 1939".

[6] 26 U.S.C., § 7807(a) reads:

Code "which depends for its application upon the promulgation of regulations," is implemented by regulations prescribed under the 1939 Code which would be appropriate as regulations for the indicated section of the 1954 Code, until regulations are actually promulgated under the latter statute. No such regulations having been issued pursuant to § 6103(a), a section which depends for its application upon the promulgation of regulations, the regulations promulgated to implement its counterpart in the 1939 Code, § 55(a), were carried over, and therefore apply to a return filed pursuant to the 1954 Code.

Appellants also contend, however, that under the regulation in question (26 C.F.R. § 458.33), the only inspections which are in any event authorized are those made under § 6103(a)(1). It is conceded by the Government that the questioned inspections would not have been authorized under § 6103(a)(1), reliance being placed solely on § 6103(a)(2).

In support of this contention, which was first advanced in Corey's reply brief, our contention is called to the phraseology of T.D. 4929, quoted in note 5, under which 26 C.F.R. § 458.33 was issued. In this

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"Rules in effect upon enactment of this title

"(a) Interim provision for administration of title.—until regulations are promulgated under any provision of this title which depends for its application upon the promulgation of regulations (or which is to be applied in such manner as may be prescribed by regulations) all instructions, rules or regulations which are in effect immediately prior to the enactment of this title shall, to the extent such instructions, rules or regulations could be prescribed as regulations under authority of such provision, be applied as if promulgated as regulations under such provision."

order the President authorized inspections in accordance with regulations "prescribed" by the Secretary and "approved" by the President. This language appears in 6103(a)(1), whereas § 6103(a)(2) refers to inspections authorized in rules and regulations "promulgated" by the President.

Despite the fact that the word "promulgated" does not appear in T.D. 4929, we believe that this presidential order was intended to cover inspections made under § 55(a)(2) of the 1939 Code (the counterpart of § 6103(a)(2) of the 1954 Code), as well as § 55(a)(1). The order commences with the recital, "By virtue of the authority vested in me by section 55(a) . . . . ," which of course embraces both (1) and (2) of § 55(a).[7] Had the President intended to invoke only § 55(a)(1), it is probable that this recital would have been so limited.

The antecedents of (1) date back to the Revenue Act of 1919, 40 Stat. 1086, while (2) was added by the Revenue Act of 1934, 48 Stat. 698. The legislative history of the latter Act discloses no reason why the same language was not employed in (2) as then existed in (1). Nor, apart from legislative history, has any reason been suggested, why Congress would want presidential permission for subsection (2) inspections to be manifested in a different way than in the case of subsection (1) inspections.

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[7] The Executive Order of January 17, 1961, which authorizes inspections pursuant to § 6103 of the 1954 Code, also makes no distinction between subsections (1) and (2) in the statement of authority contained in the order.

In the absence of any factual support for such a view we will not assume that Congress used the word "promulgate" in subsection (2) because it wished the President to personally draft regulations pertaining to that subsection. It is much more reasonable to assume that Congress expected that regulations giving effect to subsection (2) would be drafted by the proper administrative department and thereafter submitted to the President for acceptance or rejection.

This is exactly what occurred with respect to T.D. 4929 when the President approved regulations prescribed by the Securetary. The Secretary's prescription of regulations was not alone sufficient, the approval of the President was required. In effect, then, such approval constituted promulgation of the regulations, insofar as inspections of the kind here under discussion are concerned.

We conclude that under T.D. 4929, and C.F.R. § 458.33, inspections of the kind described in § 6103 (a)(2) were authorized.

Appellants do not contend that the procedure followed by the Department of Agriculture in obtaining copies of Corey's income tax returns is contrary to that specified in the rules and regulations in question. We therefore conclude that the district court did not err in denying the motions for a new trial.

This brings us to the specifications of error relating to the judgments of conviction.

Smith contends that the court erred in making the

following comment to the jury in the course of its instructions:

> "Perhaps this is a good place for me to comment on Mr. Phelps. I think most of you already know by my questions and by the statement I made at the conclusion of his testimony that I didn't think very much of Mr. Phelps either as a lawyer or as a man . . .
>
> "In other words, I am not commenting upon the credibility of any other witness other than Mr. Phelps, and I do that because I think it was apparent to you that I didn't believe him when he testified."

The making of this comment had its genesis in an exchange between the judge and Jon A. Phelps which occurred while Phelps was on the witness stand. Phelps, who is a lawyer, was called to corroborate Smith's testimony that he had obtained legal advice to the effect that Corey's participation in the business would not be illegal. During cross examination Phelps testified that it had been his opinion that Smith had been operating individually, before the written agreement between Smith, Corey and Richards was drawn, and that even after the signing of the agreement Smith was the owner and operator, with Corey and Richards as indemnifiers rather than partners.

The judge then questioned Phelps in detail as to whether such an opinion was justified in view of the specific provisions of the written agreement. The judge began with the question, "That is not the way you drew it, though, is it?" Calling attention to a particular section of the agreement, the judge then stated: "You provided that Smith couldn't even execute a bond with-

out the permission of the other two men." Phelps called attention to another provision which he believed to support his view, whereupon the judge again referred to the section to which he had first directed attention. Phelps made a response which obviously did not satisfy the judge, whereupon this colloquy occurred:

> "The Court: There is no provision for indemnification in that contract, is there? Young man, how long have you practiced law? The Witness: Eleven years. The Court: How long had you practiced at the time Mr. Smith came to see you? The Witness: Seven years, if the Court please. The Court: Had you practiced continuously? The Witness: Yes, sir . . ."

Almost immediately after this episode, which evoked no objection from Smith's counsel, the judge, apparently realizing that the correctness of Phelps' legal advice to Smith was irrelevant, told the jury on his own motion:

> "THE COURT: Ladies and Gentlemen, this evidence is not to determine whether he got good advice or not. I might tell you it is just to determine whether Mr. Smith acted in good faith in reliance on the advice given to him by a lawyer. You do not have to determine whether Mr. Phelps is a good lawyer or not. You just have to determine whether Mr. Smith acted on his advice."

It would have been better if the judge had not engaged in this colloquy with Phelps on a matter which shortly afterwards was recognized as being irrelevant. Any prejudice which might otherwise have resulted from this incident, however, was in our opinion overcome by the instruction, quoted above, which the judge gave almost immediately after the incident.

The comment concerning Phelps' credibility made at the close of the case, was within proper bounds, when considered in context.[8] The fact that such comment may also have indirectly reflected upon Smith's

[8] The comment complained of consists of two remarks. Shortly before the first of these, the court told the jury:

> "If a person in good faith seeks the advice of a lawyer as to what he may lawfully do in the matter of forming and operating a partnership with two undisclosed partners, one of whom is then Director of the Government agency with which the partnership proposes to deal, and if he fully lays all of the facts which he honestly regards as pertinent before his lawyer and then honestly and in good faith follows the lawyer's advice, which he believes to be correct, he would not be guilty of any crime even if the advice proved to be wrong."

Immediately after the first remark complained of, the court stated:

> ". . . Under the law I have the privilege of making this statement because I may comment upon the credibility of any and all witnesses. But you are privileged to disregard any comment I make about the credibility of a witness, because, under the law, you are the sole and exclusive judges of the facts and the credibility of all witnesses. Therefore, if you decide that Mr. Phelps is a creditable witness and he is to be believed, you have the privilege of doing that in spite of what I commented. I want to make it perfectly clear that the mere fact that I have singled out Mr. Phelps for special attention does not mean that I believe that all of the other witnesses were telling the truth or the whole truth. That will be a matter for you to determine under the rules that I shall lay down for you."

Later in the course of the instructions, the court told the jury: "You are the exclusive judges of the facts in the case, and the credibility of all the witnesses." This same instruction was repeated a few moments later. After exceptions to the instructions were taken, the jury was called back to the courtroom and the following additional instruction was given:

> "With reference to Mr. Phelps, I commented upon Mr. Phelps, the Wenatchee, Washington, lawyer. I want to add that whatever I said concerning the fact that a person who in good faith contacts a lawyer and gets bad advice may rely on that bad advice, if he has honestly and in good faith divulged all the facts to him. That would apply not only to the first eight counts but also to the two conspiracy counts as far as Mr. Smith is concerned . . ."

credibility, in view of the corroborative nature of Phelps' testimony in other respects, is immaterial.

Smith next argues that the court erred throughout the trial in unnecessarily taking an active part in the prosecution, interfering with the examination of witnesses, questioning and commenting in such way as to show a hostile attitude toward appellants and their defense, giving instructions which unfairly commented upon the evidence and giving instructions which, considered in their entirety, unduly favored the Government. The necessary effect of these errors considered in totality, Smith argues, was to deny him a fair trial by jury.

A federal trial judge, as has many times been said, is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies. He may assist the jury by commenting upon the evidence and this may include an appraisal of the credibility of witnesses, providing the comment is fair and the jury is clearly instructed that they are to find the facts and may disregard such comments.

In fulfilling this responsibility during the stress of a criminal trial, few, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a court-

room climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial.

No useful purpose will be served by outlining and discussing each trial incident of which complaint is made. Some of the instances in which the judge took a personal hand in the proceedings undoubtedly proved helpful to the prosecution, others unquestionably aided appellants. Perhaps most judges would have taken a less active role in the trial. But the role which was here taken was not such as to constitute a substantial and unwarranted interference with counsel in the presentation of their cases, nor does it appear to us that the judge was biased.

A review of the entire record convinces us that the judge did not participate in the proceedings in such a way as to deprive appellants of a fair trial by jury.

Smith complains of the refusal of the court to give his requested instruction to the effect that testimony showing a good character may alone be sufficient to create a reasonable doubt and require a verdict of not guilty.[9] Instead, the court instructed that the fact of

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[9] The requested instruction reads as follows:

". . . The defendant L. M. Smith has produced evidence of his good character as an honest and law-abiding citizen. This evidence has not been rebutted or contradicted.

"Mr. Smith's good character is relevant in determining whether it is probable that he is guilty as charged, and you must give it due weight and consideration in your deliberations.

"Testimony showing a character for honesty and integrity may alone be sufficient to create a reasonable doubt and require a verdict of not guilty, although without it the evidence might otherwise be convincing."

Smith's good character is for the jury to consider with other facts concerning him because that testimony, like other testimony, may generate a reasonable doubt as to Smith's guilt, justifying an acquittal.[10]

As appellant concedes, the refusal to give the requested instruction and the form of the instruction which was given accord with the rule in this circuit.[11] This is also the established rule in the second and third circuits.[12] On the other hand, the seventh, tenth and District of Columbia circuits follow a rule which would call for the giving of the requested instruction.[13]

In *Edgington* v. *United States*, 164 U.S. 361, the Supreme Court reviewed a trial court instruction to the effect that evidence of good character could be considered only if the rest of the evidence created a reasonable

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[10] The instruction which was given reads as follows:

"Mr. Smith has presented evidence of his good character and as an honest and law-abiding citizen. This is a fact for you to consider with other facts concerning Mr. Smith because that testimony, like other testimony, may generate in your mind a reasonable doubt as to the guilt of Mr. Smith justifying an acquittal, since the jury may think it improbable that a person of good character would commit the crimes with which he has been charged. However, if, after weighing all of the evidence, you are convinced beyond a reasonable doubt that Mr. Smith is guilty of the crimes charged against him in one or more counts, it will be your duty to find him guilty, notwithstanding the fact that he is or was a person of good character."

[11] *Alverez* v. *United States*, 9 Cir., 282 F.2d 435, 438; *Kasper* v. *United States*, 9 Cir., 225 F.2d 275, 278; *Baugh* v. *United States*, 9 Cir., 27 F.2d 257, 261.

[12] *United States* v. *Lowenthal*, 2 Cir., 224 F.2d 248, 249; *Ridenour* v. *United States*, 3 Cir., 14 F.2d 888, 892.

[13] *United States* v. *Donelly*, 7 Cir., 179 F.2d 227, 233; *Miller* v. *United States*, 10 Cir., 120 F.2d 968, 971; *Villaron* v. *United States*, D.C. Cir., 184 F.2d 261, 263.

doubt of the defendant's guilt, and that if their mind hesitated on any point as to the guilt of the defendant, then they had the right and should consider the testimony given as to his good character.

This instruction, which was far more restrictive than the one given in our case, was held to be erroneous, the Supreme Court saying, at page 366:

> ". . . , the decided weight of authority now is that good character, when considered in connection with other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it, the other evidence would be convincing."

In the later case of *Mickelson* v. *United States*, 335 U.S. 469, 476, the Supreme Court construed its earlier opinion, saying:

> ". . . This privilege is sometimes valuable to a defendant, for this court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed . . . (citing *Edgington*)."

We do not regard the language just quoted as a mandate to give such an instruction in every criminal case where testimony of good character is received. The limiting word "proper" indicates to us that some measure of discretion is left to the trial court in determining whether to do so. If, for example, some trial incident, or some remark made by the prosecution during argument, could lead the jury to believe that testimony of good character is only "make-weight" and could not, of

its own force, create a reasonable doubt, a corrective instruction utilizing the quoted language of the Supreme Court would be appropriate and might even be required. In the case before us, no circumstance of this kind is called to our attention.

Absent a special reason for giving the "such testimony alone" form of instruction, we think that an instruction of the kind given here fairly and adequately advises the jury on the point, and fully accords with the underlying principle announced in the *Edgington* and *Mickelson* cases. Instructig the jury that good-character testimony, "like other testimony," may generate a reasonable doubt as to guilt, justifying an acquittal, is in substance the same as saying that good-character testimony "alone" may be sufficient to create such a doubt.

The danger in using the word "alone," when not required to meet a special trial problem, is that the jury may mistakenly take it as an invitation to consider good-character evidence to the exclusion of all other evidence. As this court said in *Baugh* v. *United States*, 9 Cir. 27 F.2d 257, 261, such an instruction "... would be to accentuate and give undue prominence to what after all is but one of many circumstances in evidence."

The trial court did not err in refusing to give the requested instruction relating to testimony as to good character.

Smith specifies as error the denial of his motion made before trial, that the phrase "to the effect" be stricken from each of the first eight counts of the in-

dictment as prejudicial surplusage. It was in these counts that Smith was charged with the making of false statements in violation of 15 U.S.C., § 714m(a). The use which was made of the criticized phrase in each of these eight counts is illustrated by the use made of it in the ninth paragraph of the first count, quoted in the margin.[14]

It is argued that by leaving this phrase in the indictment in each of the first eight counts the result was either (1) that the charge itself was that Smith had made statements which *could* be interpreted by others as meaning that he was the "sole owner," or (2) that the implication was permitted to be made to the jury that all the Government needed to show was that Smith used the words which *could* be interpreted by the jury as meaning that he was the "sole owner." Smith points out that in his final argument the prosecutor specifically referred to this language in the indictment, saying:

> "Our indictment says that his statement was to the effect that he was the sole owner, and I submit to you that that is true."

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[14] "9. That in connection with these negotiations and as a part thereof the defendant LAURENCE M. SMITH, for the purpose of influencing the action of the Commodity Credit Corporation and to obtain money and other things of value under the Commodity Credit Corporation Act, did knowingly, on or about April 26, 1956, within the city of Portland, Oregon, and the jurisdiction of this court, cause to be made to the Commodity Credit Corporation through the Portland Commodity Office, Commodity Stabilization Service, a false statement in an application for approval of certain warehouse facilities, to-wit, Commodity Credit Corporation Form CC-24, said false statement being to the effect that the defendant LAURENCE M. SMITH was the sole owner of the Three State Warehouse Company, whereas in truth and in fact the Three State Warehouse Company was at that time a partnership owned by LAURENCE M. SMITH, EARL C. COREY and Willard A. Richards."

In our opinion, the words "to the effect" do not have the connotation Smith attributes to them. The Government utilized this method of alleging that a variety of false statements was made, none of which were set out verbatim in the indictment, but all of which were generally described as statements, which conveyed the meaning that Smith was the sole owner.[15] The Gov-

[15] The reason why the Government elected to make reference to the alleged false statements by means of this general description, rather than by setting out the asserted false statements verbatim, is apparent when the instruments in which the statements were made are examined. For example, in Count I it was alleged that a false statement "to the effect" that Smith was the sole owner of the Three State Warehouse Company was made in an application dated April 26, 1956, for approval of certain warehouse facilities, made out on Commodity Credit Corporation Form No. 24. This instrument was introduced as Government Exhibit 1. On line 11 of that form, places were provided for the applicant to indicate, by a check mark, whether the facility was operated by a corporation, individual or partnership. Smith checked the place indicating the operation was by an individual. In line 13, calling for the names and titles of all persons authorized to execute agreements, Smith gave only his own name and gave, as his title, "Owner." In line 14, calling for the names and titles of all persons authorized to issue warehouse receipts, Smith gave his own name, and his title as "Owner," and also gave the name of Con Jacobsen "Mgr." with the title "Supt." The application was signed, "L. M. Smith dba Three State Warehouse Co., (Applicant), by L. M. Smith, Owner (Title).

In proof of the allegation under Count III, that on April 25, 1956, Smith had made a false statement to the effect that he was the sole owner of the Three State Warehouse Company, in a statement showing assets and liabilities made out on Commodity Credit Corporation Form No. 68, Government Exhibit 3 was introduced. On the first page of the form there are three boxes to be filled in, one if the applicant is a corporation, another if the applicant is a partnership, and a third if the applicant is an individual. Smith filled in the box for individuals, leaving the partnership box blank, although the company was a partnership at that time. He signed the statement with just his signature although these directions were printed on the signature page: "Be certain to use corporation or partnership style in signing statement, if a corporation or partnership."

It would have added greatly to the length of the indictment to

ernment did not, in those counts, undertake to charge that the exact words constituting the false statement were, "I am the sole owner."

Smith was not prejudiced by the failure to set out the exact words of the false statements in the indictment as the words relied upon were contained in documents which were specifically described in the indictment. There was no claim of surprise and there was no surprise.

Any possibility that the jury might take the phrase "to the effect" as permitting conviction merely on a showing that the actual statements were *subject* to the interpretation that Smith was the sole owner, or that from them the Commodity Corporation official assumed that he was the sole owner, was foreclosed by the explicit instructions given by the trial court.[16]

Smith also argues that the instruction quoted in note 16 is erroneous because, whereas the Government was required to prove that Smith used the words "sole owner," this instruction advised the jury that they

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set out, in verbatim form, not only the allegedly false statements but also the context in which they appeared in order to demonstrate that the statements were false because of the context.

[16] The instruction as to this reads as follows:

"However, in order to find that the Defendant Smith represented that he was the sole owner on one or more of these documents, it is not necessary that the documents use the words 'sole owner' or that the defendant wrote or caused to be written the words 'sole owner.' You may find that the Defendant Smith represented in a particular document that he was the sole owner if you find that the words that were printed in the document itself and the words written or caused to be written by the Defendant Smith permitted no interpretation other than that Smith was the sole owner."

could convict without finding that Smith used those exact words.

This argument again reflects a misunderstanding of the indictment. Smith was not charged with making a false statement, to-wit, "I am the sole owner." He was charged with making false statements to the effect that he was the sole owner. The instruction was entirely consistent with the charge. Nor, in view of the context, could use in this and other instructions of the word "represented" instead of "stated," have misled the jury into considering the charge as one of fraudulent misrepresentation.

At the close of the Government's evidence in chief, Smith moved for dismissal of the first eight counts on the ground that the evidence did not show any false statement. The motion was denied. The same motion was made and denied at the close of all the evidence.

Assigning the denial of these motions as error, Smith argues that as to the first eight counts the use of the phrase "to the effect" left the counts so vague, uncertain and indefinite that they failed to charge any ultimate fact against Smith. For the reasons already indicated we hold that the counts were not defective in this respect.

As an additional ground for challenging the denial of these motions, Smith contends that the evidence was insufficient to support a verdict of guilty. He argues that the proof went no further than to produce an opportunity for speculation and conjecture. "The forms filled out by Smith," he asserts "nowhere called upon

him in any instance to specifically state whether or not he was the 'sole owner' and he did not so state."

Insofar as this may be a continuation of the argument that the Government was required to prove that the exact form of the false statement was "sole owner," we have already indicated our reasons for holding otherwise. But Smith also seems to be arguing that the jury was not warranted in finding, from the way in which the forms were filled out and signed, that the only possible interpretation was that Smith had, in effect, stated that he was the sole owner.

Since the sentences as to each of the counts run concurrently with each other and concurrently with the sentence imposed on Count I, Smith cannot prevail on this argument unless he can show that the evidence was insufficient as to all eight counts. In our opinion it was sufficient as to all counts, although it was more conclusive as to some than to others. See note 15 where the basis for Counts I and III is discussed.

All of Smith's remaining specifications of error relate to his conviction under Counts IX and XI, the conspiracy counts. Since the sentences on the conspiracy counts were concurrent with those on the substantive counts, Counts I to VIII, directed against Smith, it is unnecessary for us to consider whether error was committed as to those counts.

Several of Corey's specifications of error relate to his conviction, under Count X, of a violation of the conflict of interest statute, 18 U.S.C., § 434. We first review the evidence bearing upon this conviction.

Corey was appointed director of the Portland office of Commodity in January, 1955. The duties of the office were described in 20 F.R. 8788, November 30, 1955.[17] They were described in a great deal more detail in an official job-description document issued by the Department of Agriculture.[18]

Until about August, 1955, it was Corey's practice to personally execute grain storage agreements with warehousemen. A memorandum was then issued by the Deputy Administrator of the Commodity Stabilization

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[17] This regulation reads in part:

"C. Directors of Divisions and CSS Commodity Offices. Under the general supervision and direction of the Administrator or of the Deputy Administrator who has been specifically assigned responsibility for direction of the programs and activities involved, the directors of all divisions of the CSS and directors of all CSS commodity offices are authorized to execute contracts, agreements and other documents; settle and adjust CCC claims within limitations established by the Commodity Credit Corporation; and perform any other actions necessary to the performance of their assigned functions and responsibilities. . . ."

[18] This job description reads in part:

". . . Interprets and adapts national programs to meet local and area conditions. These encompass (1) method of executing agricultural programs, (2) CCC pricing policies under assigned programs, (3) disposal and acquisition policies such as when, at what prices, what quantities, and what qualities of commodities should be released or acquired, (4) sales and purchase specifications on requirements of CCC, (5) storage requirements including methods of handling, storing, and protecting commodities owned by the corporation, and (6) methods for adjusting CCC operations to the maximum extent practical with trade practices. In adapting programs to meet area conditions the Director determines those commodities or groups of commodities which should be reconcentrated, bought, sold, held in storage, and diverted for other uses or determines that these activities should not be activated because of effects of such actions on commodity markets or other segments of the agricultural economy of the area. . . ."

Service, entitled, "Change in Policy with Respect to Storage Contract Agreements." It was stated in this memorandum "that the Director may redelegate contract approvals on storage and handling of CCC-owned commodities to an appropriate and responsible person within the CCC office. . ."

On August 26, 1955, acting pursuant to this memorandum, Corey redelegated authority to execute storage contracts requiring the signature of a contracting officer. At that time Corey also redelegated authority to execute contracts as representatives of the Secretary.

The officers who had received redelegations of authority from Corey had authority to exercise, and did exercise, independent discretion in entering into contractual obligations on behalf of Commodity. It was not necessary for them to consult with or secure the approval of Corey or any other Government officer before negotiating and signing such contracts for Commodity. Under this organizational setup the business of Commodity with respect to approval and inspection of warehouses, grain storage contracts, concentration or removal of grain in particular warehouses and financial settlements was transacted for the most part in a routine manner by others than the director and without orders or interference by the director.

The fact, however, that contracts were executed and other business relating to grain storage was conducted by subordinates of the director without his specific direction or concurrence in each instance does not mean that the director was freed of all duties which could

affect the terms and conditions of warehouse contracts, the negotiating of such contracts, and profits derived thereunder.

In the redelegation memorandum it was provided that the overall responsibility of the director, ". . . included the delegated responsibility for contract approvals, even if it were further redelegated to some other appropriate and responsible individual within the office."

It appeared that while acting as director of Commodity, Corey frequently participated in telephone conferences, usually in the presence of heads of the departments, relating to the movement of grain into and about the Portland area. The directors of the various commodity offices also assisted in the negotiation of the warehouse rates, hence the profits earned by each warehouse were in part determined by the director.

The trial court instructed the jury, in effect, that Corey could be convicted under the conflict of interest statute if he was a partner in Three State Warehouse Company, was employed as an officer or agent of the United States as head of an office which did business with that company, and if he knew that the company was doing business with the office over which he had charge. The trial court also advised the jury that, under the circumstances, it was not necessary for the Government to show that Gorey physically executed one or more of the contracts between Commodity and the warehouse company, or that he engaged in negotiations looking towards the execution of those contracts.

Counsel for Corey objected to the giving of this instruction on the ground that

> ". . . to violate that statute it is necessary that an officer or agent of the Government himself be employed to transact business with a concern which he has an interest in or that he act in the transaction of the business, and that if the business is conducted by others in the department to whom he does not give any particular instructions with regard to that business, then, he has removed himself from the vice dictated by the statute and he would not be guilty."

The giving of this instruction, and the refusal to give an instruction tendered by Corey which would have advised the jury in accordance with the quoted objections, are specified as error.

The question presented is whether an officer or agent of the United States who is the administrative head of an office which to his knowledge negotiates, and enters into contracts with a particular business entity, but who does not personally participate in such negotiations or the execution of such contracts, and who does not give any particular instructions with regard to those dealings to his subordinates who carry on such dealings under blanket authority, may be found to have engaged in "the transaction of business" with such entity, within the meaning of the conflict of interest statute, 18 U.S.C., § 434.

In *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, the Supreme Court observed that § 434 "speaks in very comprehensive terms," unrestricted "by numer-

ous provisions and exceptions, as is true of many penal statutes" (page 549); that the "obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of public welfare," (page 548); and that the "statute is thus directed not only at dishonor, but also at conduct that tempts dishonor." (page 549).

Having in view these legislative objectives, we think the statutory words "the transaction of business" were intended to include any official role played by an officer or agent of the United States, in connection with the dealings between a Government agency and a business entity, which reasonably could have been utilized to advance personal pecuniary interest to the disadvantage of the United States.

The official role depicted in the challenged instruction is one which reasonably could be utilized for such a purpose. The administrative head of a Government office who knows that subordinates in the office, subject to his control, are dealing with a particular business entity is in a position to benefit that company to the detriment of the Government, by the giving or withholding of general or specific instructions. Whether he actually gives or withholds instructions for that purpose is immaterial.[19]

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[19] It follows from this that we do not agree with the following statement contained in the report, Conflict of Interest and Federal Service, Harvard University Press, 1960, at page 43, if it is therein

Under the facts of a particular case the connection which the head of an agency has with the dealings the agency carries on with a company may be so remote and tenuous that ultimate responsibility plus knowledge are not alone sufficient to warrant a finding that the official engaged in "the transaction of business."[20] Corey did not request that a qualification of this kind be incorporated in the instruction which was given, nor did he object to the instruction on the ground that no such qualification was added. Such a request or objection would, in fact, have been inconsistent with his position that under no circumstances could Corey be found guilty unless he personally engaged in the negoti-

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implied that the statute requires only that an official "step aside":

> ". . . it is essentially, though not in words, a disqualification statute, not forbidding the employee to hold the outside interest, but requiring him to step aside from any official dealings with the entity in which he has the interest . . ."

The holding of a personal pecuniary interest which places a Government official in a position where he must "step aside," may operate to deprive the Government of supervisory service the lack of which will benefit the private company to the disadvantage of the Government.

[20] This is probably what the Attorney General had in mind when he made the following statement in an opinion rendered in connection with the nomination of Neil H. McElroy for Secretary of Defense, Hearing before Senate Committee on Armed Services, 85th Cong. 1st Sess. pages 12-14:

> "Although personal action on the part of the Secretary might pose a serious conflict of interest problem under section 434, I know of no judicial decision suggesting that the existence of ultimate official responsibility for all the activities of a department constitutes per se the 'transaction of business' within the meaning of section 434. Moreover, neither the express language of the section nor its legislative history are indicative of such a result."

It will be noted that the Attorney General does not express an opinion as to what the rule would be if there was also added the fact of knowledge that such transactions were being carried on.

ations for and execution of the warehouse contracts.[21]

[21] It is also possible that the reason no such instruction was requested was that on several occasions Corey had taken action which had a substantial pecuniary effect on the company, hence that such an instruction would be unlikely to assist Corey. The following are illustrations of some of the actions taken by Corey which might be said to "tempt dishonor":

(1) On January 10, 1957, the chief of the field operations division of the Portland Commodity Office directed a memorandum to Corey stating in part: "Now that the space situation has changed to the point where there is actually a surplus of conventional facilities, it is our recommendation that consideration be given to the removal of our stocks from these [temporary] facilities prior to that stored in permanent, conventional granaries." Attached to this memorandum was a list of the "temporary" facilities, and on this list was Three State Warehouse Company. At the trial the official who sent this memorandum testified that to his knowledge, no action was taken to implement the suggestion that temporary facilities be unloaded first. Had this recommendation been followed it would have adversely affected the economic position of the company in which Corey was financially interested.

(2) On July 23, 1958 Corey called the Director of the Minneapolis office of Commodity and requested that certain wheat be shipped from Montana to the Portland area. A confirming telegram was then sent from the Portland offite over the initials of Corey, reading in part as follows: "All proteins running from 10 to 11.50, bill direct to CCC, c/o Three State Warehouse, Bell Station, Portland, . . ." The Director of the Minneapolis office testified that no grain was shipped in response to the request, because "When we analyzed the wire, we found that none of these elevators wanted to ship . . ." He further testified "Q. In your practice, is it usual or unusual that a specific warehouse be named as a recipient of the grain? A. It is rather unusual. It has been done, but very seldom."

(3) At a time during which Three State Warehouse Company, among others was being filled with Government grain, a large number of ships of the federal reserve mothball fleet was being unloaded. As studies indicated that grain could be satisfactorily stored in ships at a cost which was but 1/12th of the cost of storage in private commercial facilities, an independent audit of the Department of Agriculture resulted in a recommendation being made by the auditors to Mr. Corey that the unloading of the ships be discontinued. Mr. Corey declined to follow this suggestion, stating that he would not do so and furthermore that the question of inventory management was a matter of his responsibility and not that of the auditors.

Corey directs attention to evidence which tends to minimize

We therefore hold that the questioned instruction was not erroneous and that the court did not err in refusing to give the requested contrary instruction.[22]

Corey contends that the court erred in instructing the jury that:

> "As a general rule, whatever a person is legally capable of doing can be done through another as an agent. Hence, if the acts of an employee or other agent are ordered or directed or authorized or consented to by a defendant, the law holds the defendant responsible for such acts as though personally committed by him."

This instruction is criticized on two grounds: (1) the doctrine of respondeat superior is not applicable in a criminal action such as this and, (2) there was no evidence that the officials who dealt with Three State Warehouse were Corey's employees or agents.

The quoted words, standing alone, are subject to the construction, which would be inaccurate, that Corey's subordinates in the Portland Commodity office were his personal agents and employees. Read in context with what immediately preceded and followed the quoted words, however, it will be seen that the trial judge was not speaking of Corey's personal employees or agents but only of the fact that he had direction and control

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his perdence participation in these transactions, but the evaluation of this evidence was for the jury. He also refers to evidence and advances arguments bearing upon the wisdom of his personal action in these matters, but this is immaterial.

[22] Corey also moved for acquittal at the close of all the evidence, partly on the ground that there was no evidence of Corey's personal participation in transactions between Commodity and Three State Warehouse Company. The trial court did not err in denying this motion.

over his subordinates in the Portland Commodity office. Just before using the quoted words, the judge had given the instruction which has been discussed above, in which one of the essential elements in order to convict was said to be Corey's knowledge that Three State Warehouse Company was doing business with the office "over which he had charge."

Immediately after making the criticized reference to "agent" and "employee," the trial judge instructed:

> "For example, it is not necessary to show that the Defendant Corey physically executed one or more of the contracts between the Commodity Credit Corporation and the Three State Warehouse Company, or engaged in negotiations looking toward the execution of these contracts, if he knew that such negotiations were being conducted and such contracts were being entered into by employees of the Portland Commodity Office under his direction and control, and if such employees were performing these acts with his knowledge and consent. In other words, the fact that these transactions were being handled in a routine manner by employees of the Portland Commodity Office, who had no knowledge of Defendant Corey's interest in Three State Warehouse Company, would not exonerate Defendant Corey of any liability which he might otherwise have, provided you find that these negotiations were being conducted and the contracts were being entered into with Corey's knowledge and consent."

During the colloquy which occurred between court and counsel while Corey's counsel was voicing his objection to this particular instruction the court indicated that by his reference to a man's liability for the acts of his agent, he had in mind only Corey's responsibility for office subordinates who were under his direction and control.

The court offered to instruct the jury that "these two statements that I made mean the same thing." Counsel for Corey indicated, however, that he would not be satisfied with this, because of his broader position that Corey would not be guilty in any event, unless he personally participated in the transaction. Accordingly, no such additional instruction was given.[23]

We have already expressed the opinion that it was proper to instruct that one who is the head of a Government office which, to his knowledge, does business with a business entity, may be found to have transacted business with that office without the necessity of showing his personal participation in the dealings. This is because, under these circumstances, the jury may conclude that he ordered, directed, authorized or consented to the dealings which his office subordinate carried on with the business entity. In substance that is the meaning conveyed by the entire instruction, read as a whole.

We conclude that the trial court did not err, to Corey's prejudice, in giving this instruction.

Corey's remaining specifications of error deal with the conspiracy counts which we need not consider for the same reason stated with reference to Smith's appeal.

In this opinion we have dealt with every argument by each appellant which, in our view, is of enough substance to warrant discussion. The few arguments which have not

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[23] The jury was called back for some additional instructions on other matters. When the court completed these it inquired, "Is there anything else, counsel?" Counsel for both appellants answered, "No."

been discussed have nevertheless been considered, but have been found to be without merit.

The judgments, and the orders denying the motions for a new trial, are affirmed.

(Endorsed) Opinion Filed June 27, 1962.

Frank H. Schmid, Clerk.

APPENDIX B

No. 45 in Record of United States Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

L. M. SMITH, also known as Laurence M. Smith, and EARL C. COREY, Appellants,	)	
vs.	)	No. 17601
UNITED STATES OF AMERICA, Appellee.	)	

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered June 26, 1962
FRANK H. SCHMID, Clerk

No. 46 in Record of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L. M. SMITH, also known as Laurence M. Smith, and EARL C. COREY, Appellants,	)	
vs.	)	No. 17278
UNITED STATES OF AMERICA, Appellee.	)	

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered June 26, 1962
FRANK H. SCHMID, Clerk

No. 47 in Record of United States Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, July 31, 1962

Before CHAMBERS, BARNES and HAMLEY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of petitioners, filed July 24, 1962, and within time allowed therefor by rule of Court for a rehearing of above causes be, and hereby are denied.

APPENDIX C

Tr. 12 * * *

"With reference to this whole matter, in the light of Mr. Luckey's opening statement that was just made, I think it might be helpful to cover a little bit of some of the ins and outs of the grain storage business in connection with various things that may or may not affect some of the insinuations that have been made to you this morning.

I don't know whether you all understand this Government program. As I understand it, very briefly, the Government"

Tr. 13 * * *

"in connection with the supporting of the price of wheat undertakes to loan to farmers a certain price which is fixed by Congress on the wheat as soon as it is harvested and placed in a warehouse, so that is usually in the late summer of each year it is placed in a warehouse, and the money is loaned. The farmer gets the money at that time, and then he still owns the wheat, and he may sell it if the market price—of course, he may sell it if he wants to, but he would not sell it unless the market price goes above the loan amount, the price loaned by the Government, so that causes the Government, and is causing the Government, to obtain a very large surplus of wheat through the years. It is held over one year and then piled up and piled up and piled up.

Just as an example, in this Northwest—and this is an area which we call the Pacific Northwest that is a unit in this business, which is Washington, Oregon and Northern Idaho,—in the Pacific Northwest I understand that, for instance, from 1952 to 1956, the year in which this business started that is involved in this case, the holdover surplus of the Government in wheat in this Northwest,—Oregon, Washington, Northern Idaho—arose from seven

million-some odd bushels to twenty-six million-some odd bushels. That is wrong—to 136,000,000.

THE COURT: What is the relevancy of this? We are not going to try the Commodity Credit. We are not going to find out whether it is a good plan or a bad plan. We are just trying"

Tr. 14 * * *

"to find out whether the defendants did the things they are charged with doing. If they owned a warehouse and didn't divulge it, that is one thing, but I do not think we have to worry about how many bushels of wheat are being stored in Government warehouses or any other warehouses.

MR. SPAULDING: I only go into this in the light of Mr. Luckey's statement that the Government got a bad deal in some of these warehouses.

THE COURT: I am going to rule now it does not really make any difference whether they got a bad deal or not.

MR. SPAULDING: Very well.

THE COURT: The Government is entitled, Ladies and Gentlemen, to have the undivided loyalty of a man who deals with the Government, and even if he didn't divulge it it wouldn't make any difference.

MR. SPAULDING: In the light of the ruling, then, I will pass from that subject to the matter with reference to the Warehouse business, merely stating that in 1956, if I may explain, and the years immediately prior to that there was a very definite shortage of warehouse space, and that is what I was getting at."

* * * * *

Tr. 110 * * *

"Q How did you learn about them?

A Mr. Corey called me and told me that there was some space available.

THE COURT (To the Jury): Did you all hear what Mr. Richards said, that Mr. Corey called him

and said there was space available?

Proceed."

* * * * *

Tr. 131 * * *

"Q As a matter of fact, however, you were not agreeing to spend any time or any effort in Three State Warehouse?

A Not a bit.

Q Or to have anything to do with the operation of it or its policies or decisions?

A Nothing.

THE COURT: Are you still connected with Mr. Smith?

THE WITNESS: Yes, sir.

THE COURT: Do not ask him any more leading questions because he is a friendly witness to you; no more leading questions of this witness.

MR. SPAULDING: Very well.

Q Mr. Richards, state whether or not you were a witness before the Grand Jury in this matter.

A I was.

Q State whether or not you have been named in the indictment here as a co-conspirator but not a defendant?

A That is correct.

Q Did you have a conversation with Mr. Luckey, the United States Attorney, just before you went into the Grand Jury with respect to whether or not you might be indicted?

A I had a conversation with Mr. Luckey that morning, yes. We talked about it in his office, and he told me what my"

Tr. 132 * * *

"privileges and rights were of appearing before the Grand Jury, and at the same time he did make a statement that, as far as he was concerned, he didn't think there was an indictment against me, but he never knew what the Grand Jury might do."

* * * * *

Tr. 145 * * *

BY MR. SPAULDING:

"Q Mr. Jacobson—your Honor, in view of the fact that he is employed by Mr. Smith, should I not ask leading questions?

THE COURT: That is right.

MR. SPAULDING: Very well.

THE COURT: I don't think you should.

MR. SPAULDING: Very well.

THE COURT: Are you going to interrogate him on matters about which he has testified now?

MR. SPAULDING: Yes, but very briefly, however.

THE COURT: Proceed.

MR. SPAULDING: Q With reference to the operation of the warehouse, have you been the one, ever since you first came here which was, I think you said, May, 1956, who has actually operated, I mean done the physical work of operating the warehouse?

A Yes, sir."

Tr. 146 * * *

"Q Has Mr. Smith himself spent any time at all doing——

THE COURT: I think you are now going into matters not covered by the direct examination.

MR. SPAULDING: Well, the operation of the warehouse is all. I am not going further into it. I just want to clear up that one point.

THE COURT: Clear up what point?

MR. SPAULDING: How the warehouse was actually operated is all: what his work was.

THE COURT: You want to bring out that Mr. Smith didn't do any work at all?

MR. SPAULDING: I was not saying not any at all, no, but this was the man that was doing the work, operating it, is what I wanted to bring out. I won't press it. Nothing further."

* * * * *

Tr. 166 * * *

"MR. BERNARD: I object to that as being speculation of the witness.

THE COURT: Objection sustained.

MR. ROBINSON: Your Honor, the reason why I asked the question is so that we may show that this is a matter which has materiality, and I think the only way we can show that is to ask the witness a question of this type.

THE COURT: It is an improper question."

* * * * *

Tr. 168: * * *

"THE COURT: Did you know that anyone other than Mr. Smith was the owner of the Three State Warehouse?

THE WITNESS: No, sir; I did not.

THE COURT: Did you have any information? Did any of your other people bring you that information orally?

THE WITNESS: No, sir; they did not.

THE COURT: When you signed the document, you did so on the representations contained in the document that Mr. Smith was the owner?

THE WITNESS: Yes, sir.

THE COURT: Had you known that other people were interested, would you have been required to make an investigation as to these people, as to their assets and liabilities?

THE WITNESS: In a partnership, yes, sir; in a partnership we required the individual financial statement from each partner as well as a financial statement from the company operation.

THE COURT: But in this particular instance only the financial statement of Mr. Smith was submitted?

THE WITNESS: Yes, sir.

THE COURT: You may proceed, Mr. Robinson."

* * * * *

Tr. 241 * * *

BY MR. LUCKEY:

"Q One question: Did the checks that went to Mr. Corey and back to Mr. Smith in that fashion equal exactly $30,000, or was there an amount for interest?

A I do not remember, but I am sure that there was not an amount for interest.

THE COURT: There was not?

THE WITNESS: Not an amount for interest.

MR. LUCKEY: Thank you.

* * * * *

Tr. 244 * * *

"THE COURT: What do you want to prove by this witness?

MR. ROBINSON: Concealment of the partnership, your Honor.

THE COURT: That he represented he was the sole owner?

MR. ROBINSON: Yes.

THE COURT: You have a lot of documents in there. Is there any objection to these documents going into evidence?

MR. SPAULDING: None at all.

THE COURT: They are admitted.

(Manila folder captioned 'Three State Warehouse Co., 279934,' previously marked GOVERNMENT'S EXHIBIT 60 generally for Identification, was thereupon received in evidence.)"

Tr. 245 * * *

"MR. ROBINSON: Could we mark the file, your Honor? I haven't had an opportunity to separate them out.

THE COURT: Yes, they are so marked. The file will be returned to you subsequently. Those documents which show that he represented he was the sole owner may be admitted, or do you want to

stipulate to that effect?

MR. SPAULDING: Well, I have no objection to the documents, your Honor.

THE COURT: Are there any further questions?

MR. ROBINSON: No further questions.

THE COURT: Do you have any questions of this witness?"

* * * * *

Tr. 335 * * *

"Q Attached to that document there is a Schedule of Rates, is there?"

Tr. 336 * * *

"A Yes, sir.

Q Did you have anything to do with fixing those?

A No, sir.

Q How are those fixed; do you know?

A They are determined by the Commodity Credit Corporation, Department of Agriculture.

Q Are they the same all over?

A Yes, sir.

Q All over what area?

A The United States is divided into five areas, I believe, or was at that time, and the rates for each area are identical.

Q You mean the rates for all of the areas are identical?

A No, there is some difference in rates as between areas.

THE COURT: We are getting far afield. I have let you go, Mr. Spaulding, on a lot of immaterial things. There is no contention here that any special rates were given him. That is one of the items that the Government does not claim.

MR. SPAULDING: Very well.

THE COURT: Nor is it claimed that Mr. Con Jacobsen, when he signed as Superintendent, that was a false statement. There is no such contention. Let us get down to business and get to the very

things that the Government is accusing him of doing."

* * * * *

Tr. 376 * * *

"Q Now, I believe you said that your interest in this venture before the—well, it was still a partnership or while Mr. Corey was still in it, after taxes, was $32,000. Do you the amount that it was before taxes?

A Approximately $83,000.

Q So you were in the relatively high tax bracket, I take it, Mr. Smith?"

Tr. 377 * * *

"A Yes, sir."

* * * * *

Tr. 388 * * *

"MR. LUCKEY: Q Mr. Smith, would you look at Exhibit No. 61 for Identification, and I ask you if your signature appears on that document?

A Yes, sir.

Q What is the date of that document?

A May 1, 1959.

Q Is that the time you changed over to a corporation?

A Yes, sir.

Q Would you look at the box on Page 3 of the document and advise us what box is checked in that circumstance?

A I beg your pardon?

Q Would you look at Page 3, at No. 11, and see what box, partnership, corporation or individual, is checked in that particular application.

A I didn't see it, sir.

THE COURT: Didn't you check the 'Corporation' on that box as the operator? That is what he is asking you.

THE WITNESS: Perhaps I don't understand the question, sir.

MR. LUCKEY: That may not be the one, your

Honor, possibly.

MR. SPAULDING: It would be Item 11.

THE COURT: Now this is a statement showing the assets and laibilities.

MR. LUCKEY: Q How was that signed, may I inquire, Mr. Smith?"

Tr. 389 * * *

"THE COURT: Show him the fourth page.

THE WITNESS: Signed as Three State Warehouse Co., by L. M. Smith, President.

MR. LUCKEY: Q You didn't sign it as owner in that case? You didn't sign it as owner in that case?

A I signed it as Three State Warehouse Co., By L. M. Smith, President.

MR. LUCKEY: I am sorry, your Honor; we had it here.

THE COURT: You will find it. What he wants to know, Mr. Smith, is this: After you organized the corporation, then you showed, did you not, that the corporation was the owner and operator of the Three State Warehouse?

THE WITNESS: Yes, sir.

THE COURT: He wants to know why you did that when you yourself were still the operator of it? Why did you make that distinction?

THE WITNESS: Well, there is a difference between a corporation and a partnership or a single proprietorship. Under the corporation laws, you are set up and established as a corporation in this instance, in the State of Oregon, and after that the entire business that you transact must be transacted under that corporation as registered with the State.

THE COURT: It is your thought that even though you are a partnership you were privileged to say that you were the owner of it?"

Tr. 390 * * *

"THE WITNESS: Yes, sir.

THE COURT: And operating under your own

name?

THE WITNESS: Yes, sir.

THE COURT: He has told you his answer."

* * * * *

Tr. 393 * * *

"Q Here is the document for which we were searching. May we have it marked No. 62?

(Document, Application For Approval of Warehouse, 5-1-59, 92-4-CCC-584, was thereupon marked 'GOVERNMENT'S EXHIBIT No. 62 for Identification.)

THE COURT: Is there any objection?

MR. SPAULDING: I have not ever seen it.

MR. BERNARD: I don't know what it is either.

THE COURT: It is a statement in which he says he operates as a corporation, checking the box."

* * * * *

Tr. 421 * * *

"Q Did Mr. Smith inform you that he had already agreed orally to enter into a partnership with these people?

A Discussing the early time of our first several conferences, it was a question whether they could get together. I had never drawn a partnership agreement, frankly, where one man was given the sole control. In other words, the investment of the other men was solely at his disposal.

THE COURT: I did not hear that.

THE WITNESS: Was solely at his disposal; that is, that he had a right to hire and fire and invest, handle the warehouse without any control of the other partners.

THE COURT: That is not the way you drew it, though, is it? Look at Article VIII, Section 3(a). You provided that Mr. Smith couldn't even execute a bond without the permission"

Tr. 422 * * *

"of the other two men.

THE WITNESS: Well, if the Court please, referring to Section VIII, the first Article V,

'L. M. Smith shall be the General Manager of the business of the partnership and shall devote such time as necessary to the partnership business. He shall hire and discharge employees as he may deem necessary—

THE COURT: Look at Article VIII, Section 3(a).

THE WITNESS: If the Court please, Article I and Article II are very important portions of this document relating to his right to borrow money in the firm name, utilize collateral owned by the partnership, assign, transfer, pledge, compromise or release any claims of or debts due the partnership.

Article III are acts which are really above and beyond, as I understand it, the ordinary partnership business and relate, for instance, to assignment for benefit of creditors which is not an act normally within any partner's right.

THE COURT: There is no provision for indemnification in that contract, is there?

Young man, how long have you practiced law?

THE WITNESS: Eleven years.

THE COURT: How long had you practiced at the time Mr. Smith came to see you?

THE WITNESS: Seven years, if the Court please."

Tr. 423 * * *

"THE COURT: Had you practiced continuously?

THE WITNESS: Yes, sir. If the Court please, I am reading the assumptions under the second paragraph. In my estimation where they assumed the contracts and lease obligations, that that was underwriting his obligation that he solely held himself out for.

THE COURT: Ladies and Gentlemen, this evidence is not to determine whether he got good advice or not. I might tell you it is just to determine whether Mr. Smith acted in good faith in reliance

on the advice given to him by a lawyer. You do not have to determine whether Mr. Phelps is a good lawyer or not. You just have to determine whether Mr. Smith acted on his advice."

* * * * *

Tr. 459 * **

"THE COURT: Were you and your husband partners?

THE WITNESS: No.

THE COURT: I thought you mentioned that you were partners earlier?

THE WITNESS: Did you ask me that question, if we were partners?

THE COURT: No, I mean Mr. Spaulding. I thought, had asked you whether you were a partner with your husband. Did he ask that? Perhaps you were just saying Yes to his questions. Mr. Spaulding, didn't you ask her?

MR. SPAULDING: Yes. I asked her, and I thought she said——

THE COURT: You were a partner of your husband?

MR. SPAULDING: In all of your enterprises, whatever businesses that you had, I asked you if you and your husband did your businesses together as partners. Do you remember that?

THE WITNESS: Yes. I think my answer is still Yes.

MR. SPAULDING: Well, that is what the Judge inquired.

THE WITNESS: Everything we do——

MR. SPAULDING: That is what the Judge just asked.

THE COURT: Do you have a written partnership agreement with your husband?

THE WITNESS: No. I do not."

* * * * * *

Tr. 685 * * *

"Perhaps this is a good place for me to comment on Mr. Phelps. I think most of you already know by my questions and by the statement I made at the conclusion of his testimony, that I don't think very much of Mr. Phelps either as a lawyer or as a man. Under the law I have the privilege of making this statement because I may comment upon the credibility of any and all witnesses. But you are privileged to disregard any comment I make about the credibility of a witness because, under the law, you are the sole and exclusive judges of the facts and the credibility of all witnesses. Therefore, if you decide that Mr. Phelps is a creditable witness and he is to be believed, you have the privilege of doing that in spite of what I"

Tr. 686 * * *

"commented. I want to make it perfectly clear that the mere fact that I have singled out Mr. Phelps for special attention does not mean that I believe that all of the other witnesses were telling the truth or the whole truth. That will be a matter for you to determine under the rules that I shall lay down for you.

In other words, I am not commenting upon the credibility of any other witnesses other than Mr. Phelps, and I do that because I think it was apparent to you that I didn't believe him when he testified."

* * * * *

APPENDIX D

Tr. 689 * * *

"MR. SMITH has presented evidence of his good character and as an honest and law-abiding citizen. This is a fact for you to consider with other facts concerning Mr. Smith because that testimony, like other testimony, may generate in your mind a reasonable doubt as to the guilt of Mr. Smith, justifying an acquittal, since the Jury may think it improbable that a person of good character would commit the crimes with which he has been charged. However, if, after weighting all of the evidence, you are convinced beyond a reasonable doubt that Mr. Smith is guilty of the crimes charged against him in one or more counts, it will be your duty to find him guilty, notwithstanding the fact that he is or was a person of good character."

* * * * *

Tr. 713 * * *

"THE COURT: All right. You have already told me what those requests are. You may have an exception to the failure of the Court to give any of the requested instructions or to the failure by the Court to give the instructions in the words requested."

* * * * *

Tr. 724 * * *

"MR. SPAULDING: I want to particularly call the Court's attention, even though you have given us an exception, to the failure to give any of our requested instructions. I want to particularly mention the failure of the Court to give the portion of our requested instruction with reference to character evidence, which states in substance that where the evidence was undisputed it in itself was sufficient upon which to find a reasonable doubt as to all the issues.

THE COURT: You may have the exception."

* * * * *

Requested Instruction:

> . . . The defendant L. M. Smith has produced evidence of his good character as an honest and law-abiding citizen. This evidence has not been rebutted or contradicted.
>
> Mr. Smith's good character is relevant in determining whether it is probable that he is guilty as charged, and you must give it due weight and consideration in your deliberations.
>
> Testimony showing a character for honesty and integrity may alone be sufficient to create a reasonable doubt and require a verdict of not guilty, although without it the evidence might otherwise be convincing.